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No. 06-466

IN THE

Supreme Court of the United States

PACIFIC GAS AND ELECTRIC COMPANY,

Petitioner,

v.

SAN LUIS OBISPO MOTHERS FOR PEACE, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

OPPOSITION BRIEF OF RESPONDENTS SAN LUIS OBISPO MOTHERS FOR PEACE, SIERRA CLUB, AND PEG PINARD

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QUESTIONS PRESENTED

1. Did the Ninth Circuit correctly hold that the National Environmental Policy Act requires the Nuclear Regulatory Commission, when licensing a radioactive fuel storage facility, to consider the environmental impacts of an act of terrorism against the facility, where the Commission's own policies and procedures demonstrated that it considered a terrorist act to be reasonably foreseeable?

2. Did the Ninth Circuit correctly hold that the Nuclear Regulatory Commission's asserted inability to quantify the risk of a terrorist attack did not excuse it from performing a qualitative analysis?

CORPORATE DISCLOSURE STATEMENT

San Luis Obispo Mothers for Peace ("SLOMFP") and the Sierra Club are non-profit corporations. Neither SLOMFP nor the Sierra Club has any parent company and/or subsidiary or affiliate that has issued shares to the public.

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INTRODUCTION

In the case below, *San Luis Obispo Mothers for Peace v. NRC*, 449 F.3d 1016 (9th Cir. 2006) ("*Mothers for Peace*"), the U.S. Court of Appeals for the Ninth Circuit ruled that in licensing nuclear facilities, the U.S. Nuclear Regulatory Commission's ("NRC's" or "Commission's") categorical refusal to consider the environmental impacts of intentional attacks on those facilities in an environmental impact statement or environmental assessment violates the National Environmental Policy Act. Applying basic principles of proximate causation established in *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766 (1983) ("*Metropolitan Edison*"), and *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004) ("*Public Citizen*"), the Ninth Circuit found there was a close causal connection between the NRC's licensing action and a physical impact to the environment and that the likelihood of a terrorist attack was reasonably foreseeable. The Ninth Circuit also found that any assertion that the causal connection was remote, speculative or uncertain was contradicted by the NRC's own exercise, in other contexts, of its regulatory authority and responsibility to prevent or mitigate the effects of terrorist attacks. Petitioner Pacific Gas & Electric Company's ("PG&E's") claim that the Ninth Circuit "spurned" the proximate cause doctrine as set forth in *Metropolitan Edison* and *Public Citizen* (Petition for Certiorari ("Pet.") at 1) has no basis.

Likewise, PG&E's claim that *Mothers for Peace* conflicts with the NEPA causation analyses of other circuits is unfounded. *Mothers for Peace* applies the proximate cause doctrine to proposed environmental impacts in a manner consistent with the decisions of other circuits. Although significant factual distinctions make the specific holdings of these cases inapplicable to *Mothers for Peace*, nothing about their analyses of NEPA causation contradicts the reasoning of *Mothers for Peace*. With respect to the issues of quantifica-

tion and burden of proof, PG&E simply mischaracterizes the holdings of the allegedly conflicting precedent.

Finally, PG&E's request that the Court review the policy implications of *Mothers for Peace* is inappropriate and premature. In remanding this case to the NRC, the Court of Appeals gave the agency broad latitude regarding the manner in which it may revisit its previous policy of categorically refusing to consider the environmental impacts of intentional attacks on nuclear facilities. PG&E may find the NRC's actions on remand to be reasonable, and its dire predictions regarding the effects of *Mothers for Peace* on NRC decision-making may not come to pass. The government's own failure to seek review of the Ninth Circuit's decision strongly indicates that the NRC – the agency responsible for carrying out the Court's decision – is prepared to carry out the remand and does not regard the obligations imposed on it by the Ninth Circuit as involving burdens so great as to demand this Court's intervention.[1]

STATEMENT OF THE CASE

A. The National Environmental Policy Act

Through the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321-4370f, Congress established a "national policy [to] encourage productive and enjoyable harmony between man and his environment." *Public Citizen*, 541 U.S. at 756 (quoting 42 U.S.C. § 4321). Before taking actions that may have a significant impact on the human environment, NEPA requires federal agencies to prepare envi-

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[1] In addition to not seeking review itself, the NRC has waived any entitlement it would otherwise have to support PG&E's Petition by seeking an extension of time to file a response to the petition. Under this Court's rules, a respondent who wishes to file a response supporting a petition for certiorari must do so within 20 days of the docketing of the petition, and the time for filing such a brief "will not be extended." S. Ct. R. 12.6.

ronmental impact statements ("EISs") that carefully consider the environmental impacts of proposed decisions and alternatives for reducing or avoiding those impacts. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); 10 C.F.R. § 51.71(d).

EISs must consider environmental impacts that are "reasonably foreseeable" and have "catastrophic consequences, even if their probability of occurrence is low." 40 C.F.R. § 1502.22(b)(1). Environmental impacts that are "remote and speculative" need not be considered, however. *Limerick Ecology Action v. NRC*, 869 F.2d 719, 745 (3d Cir. 1989) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 551 (1978)). Moreover, a "reasonably close causal connection" must exist between the proposed agency action and the environmental effects of concern. *Public Citizen*, 541 U.S. at 767 (quoting *Metropolitan Edison*, 460 U.S. at 774).

That the likelihood of an impact may not be easily quantifiable is not an excuse for failing to address it in an EIS. Indeed, the NRC's own regulations require that "[t]o the extent that there are important qualitative considerations or factors that cannot be quantified, these considerations or factors will be discussed in qualitative terms." 10 C.F.R. § 51.71(d).

Where it is not clear whether the impacts of a proposed action are significant, the agency may provide a more limited document, an environmental assessment ("EA") that "[b]riefly provides[s] sufficient evidence and analysis for determining whether to prepare an [EIS]." *Public Citizen*, 541 U.S. at 757 (quoting 40 C.F.R. § 1508.9(a)). If, after preparing an EA, the agency determines that an EIS is not required, it must issue a "finding of no significant impact" which states the reasons for the determination. *Id.* (quoting 40 C.F.R. §§ 1501.4(e), 1508.13).

B. Administrative Proceeding

PG&E is running out of storage space for the "spent" or used fuel generated by the two nuclear reactors on the site of the Diablo Canyon nuclear power plant. Thus, in late 2001, PG&E applied to the NRC for a license for a new facility to store spent fuel on the Diablo Canyon site in dry storage casks. As allowed by NRC regulations, respondents San Luis Obispo Mothers for Peace, Sierra Club, and Peg Pinard (collectively, "SLOMFP") requested a hearing on the adequacy of PG&E's license application in the summer of 2002.

Among other things, SLOMFP contended that the application was inadequate to satisfy NEPA because it did not address the environmental impacts of terrorist attacks on the proposed spent fuel storage facility. Pet. App. 6a, 21a-22a. Citing the NRC's increased preparedness in response to the September 11, 2001, attacks, and other assaults on U.S. facilities during the past ten years, SLOMFP argued that the NRC's own conduct shows that it considers such attacks to be reasonably foreseeable. *Id.*

The NRC denied SLOMFP's hearing request, relying on a previous decision in which it had held as a matter of law that it was not required to consider the environmental impact of intentional attacks on nuclear facilities. *Pacific Gas & Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-03-01, 57 NRC 1 (2003) (Pet. App. 32a) (citing *Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), CLI-02-25, 56 NRC 340 (2002) (Pet. App. 42a)). According to the NRC, no EIS was required because: (a) the possibility of a terrorist attack is too far removed from the natural or expected consequences of agency action to require study under NEPA, (b) the risk of a terrorist attack cannot be meaningfully analyzed because it cannot be determined quantitatively, (c) NEPA does not require a "worst-case" analysis, and (d) NEPA's public process is not an appropriate forum for sensitive security issues. Pet. App. 38a-39a.

C. The Decision Below

In December 2003, SLOMFP sought review of the NRC's decision in the Ninth Circuit. PG&E was not named as a respondent but intervened to support the NRC's actions. On June 2, 2006, the court granted SLOMFP's petition for review with respect to its NEPA claim.[2] Examining each of the four rationales offered by the NRC in *Private Fuel Storage,* the Ninth Circuit ruled that "the NRC's determination that NEPA does not require a consideration of the environmental impact of terrorist attacks does not satisfy reasonableness review." Pet. App. 31a.

First, the court evaluated issues of proximate causation, finding a reasonably close causal link between the NRC's licensing of the spent fuel storage facility and the physical impacts of a terrorist attack. Pet. App. 20a. The court also found that the NRC had failed to support its assertion that the likelihood of terrorist attacks is remote and speculative, and that the NRC's own preparations for terrorist attacks, through its regulatory actions, policies and procedures, undercut its position that terrorist attacks are not reasonably foreseeable under NEPA. *Id.* at 21a-24a.

Second, the court ruled that NEPA does not allow the NRC to ignore the environmental impacts of terrorist attacks simply because their likelihood cannot be quantified. The court also found that the NRC's own actions show it is capable of making a meaningful assessment of the likelihood of terrorist attacks. Pet. App. 24a-26a.

Third, the Ninth Circuit rejected the NRC's assertion that SLOMFP sought a "worst-case" analysis not required by NEPA. Pet. App. 26a-29a. As the court observed, SLOMFP did not "seek to require the NRC to analyze the most extreme (i.e., the 'worst') possible environmental impacts of a terror-

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[2] SLOMFP's non-NEPA claims before the Ninth Circuit are not on review here.

ist attack." *Id.* at 29a. Instead, SLOMFP sought "an analysis of the range of environmental impacts likely to result in the event of a terrorist attack" on the dry storage facility. *Id.*

Finally, the Ninth Circuit rejected as unreasonable the NRC's claim that "it cannot comply with its NEPA mandate because of security risks." Pet. App. 29a-30a. The court found that while security considerations may permit or require modifications of some NEPA procedures to protect sensitive information, NEPA contains no waiver or exemption for security or defense-related issues. *Id.* (citing *Weinberger v. Catholic Action of Hawaii/Peace Educ. Project,* 454 U.S. 139 (1981)).

The court remanded the case to the NRC "to fulfill its responsibilities under NEPA," giving the NRC wide latitude with respect to both merits and procedures. Pet. App. 31a. The court also expressed confidence that given the NRC's long experience dealing with "our nation's most sensitive nuclear secrets," it would "analyze the questions raised by the petition in an appropriate manner consistent with national security." *Id.* Under the court's remand order, as under NEPA itself, the obligation to comply with NEPA is placed only upon the NRC, and not upon PG&E. The NRC not only did not request a stay of the remand order, but also failed to seek further review either by the en banc Ninth Circuit or by this Court.

REASONS FOR DENYING THE WRIT

I. THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS.

A. The Alleged Conflict With Precedents of This Court Does Not Exist.

In *Metropolitan Edison* and *Public Citizen,* this Court applied the doctrine of proximate cause to hold that NEPA requires a "'reasonably close causal relationship' between the environmental effect and the alleged cause." *Public Citizen,*

541 U.S. at 767 (quoting *Metropolitan Edison*, 460 U.S. at 774). Those cases establish two requirements for satisfying the causal relationship standard: the alleged environmental harm must have a reasonably close connection to an actual physical impact on the environment (*Metropolitan Edison*, 460 U.S. at 776-77), and the agency in question must have authority and responsibility to use the NEPA process to prevent or mitigate the environmental harm. *Public Citizen*, 541 U.S. at 769-70. Consistent with *Metropolitan Edison* and *Public Citizen*, in *Mothers for Peace*, the Ninth Circuit found that both of these requirements were met in assessing whether the environmental impacts of terrorist attacks have a reasonably close causal connection to the licensing of the Diablo Canyon spent fuel storage facility.

The Ninth Circuit first considered the causal connection between the NRC's action and impacts to the environment, and found a close relationship between the licensing of the spent fuel storage facility and the direct physical impacts to the environment of a terrorist-induced nuclear accident. Pet. App. 20a-21a. The court distinguished the physical environmental impacts that would result if the risk of a terrorist attack were realized from the "attenuated," non-environmental impacts of psychological illness caused by the "unrealized risk" of a nuclear accident that were at issue in *Metropolitan Edison*. *Id.* at 20a-21a (citing *Metropolitan Edison*, 460 U.S. at 775 n.9).

As required by *Public Citizen*, the Ninth Circuit also examined the relationship between the impacts of terrorist attacks and the NRC's regulatory authority and responsibility, and found an unacceptable inconsistency between the NRC's pronouncements that terrorist attacks are "remote and speculative" and its "policy statements and procedures" that make preparations for a terrorist attack a high priority. Pet App. 22a-24a. In contrast to the Federal Motor Carrier Safety Administration ("FMCSA") in *Public Citizen*, which had neither caused the environmental impacts at issue nor could con-

trol them, 541 U.S. at 767-68, the NRC is directly responsible for protecting human health and the environment against the effects of a terrorist attack on its licensed facilities. Moreover, in contrast to *Public Citizen,* the court in *Mothers for Peace* established that the "policy goals of NEPA" would be served by requiring NRC to consider the environmental impacts of terrorist attacks in an EA or EIS. Pet. App. 24a. Thus, the Ninth Circuit established the connection between the impacts and the actions of the responsible agency that was missing in *Public Citizen.*

In addition, the Ninth Circuit went on to assess whether there was sufficient proximate cause in another respect that was not at issue in *Metropolitan Edison* and *Public Citizen*: whether the likelihood of environmental impacts is reasonably foreseeable or too "remote and speculative" from the agency action to require study under NEPA. Pet. App. 21a (quoting *NoGWEN Alliance v. Aldridge,* 855 F.2d 1380 (9th Cir. 1988)).[3] In evaluating this fact-based element of proximate causation, the Ninth Circuit held unreasonable the NRC's failure to respond to SLOMFP's factual contentions that the presence of the spent fuel storage facility would lead to or increase the potential for a terrorist attack, because the presence of the spent fuel storage facility would increase the potential for an attack on the Diablo Canyon nuclear plant, and because the storage facility itself would be a primary tar-

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[3] PG&E asserts that the *NoGWEN* reasonable foreseeability standard is somehow at odds with the proximate cause requirement of *Metropolitan Edison* and *Public Citizen.* Pet. 13-14. But as PG&E recognizes, the doctrine of proximate cause "embraces the concepts of certainty, foreseeability, and probability, in addition to public policy considerations germane to the issue of legal responsibility." Pet. 13 n.2, citing *Holmes v. Sec. Investor Prot. Corp.,* 503 U.S. 258, 268 (1992); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, Prosser and Keeton on Law of Torts 264, 274-75 (5th ed. 1984). Thus, *NoGWEN*'s analysis is not inconsistent with a proximate cause standard; rather, it is an integral part of the proximate cause standard.

get for a terrorist attack. *Id.* at 24a. The court also found that the NRC's own actions in preparation for a September 11-style attack show that it considers such attacks to be a reasonably foreseeable consequence of its licensing action. *Id.* at 22a-24a.

Thus, applying the proximate cause doctrines of *Metropolitan Edison* and *Public Citizen,* the Ninth Circuit rejected as unreasonable the NRC's claim that terrorists, not NRC licensing decisions, constitute the proximate cause of terrorist attacks on nuclear facilities. Contrary to PG&E's argument (Pet. 13), this holding presents no conflict with *Metropolitan Edison* or *Public Citizen.*

B. The Alleged Conflict Among the Circuits Does Not Exist.

1. Causation decisions do not conflict.

Each of the circuit cases cited by PG&E in its Petition applies the proximate cause doctrine to proposed environmental impacts in a manner consistent with *Mothers for Peace, Metropolitan Edison* and *Public Citizen.* Each case is also distinct from *Mothers for Peace* with respect to its circumstances, and thus in no case does the holding apply to the circumstances of *Mothers for Peace* or conflict with the Ninth Circuit's ruling.

In *Glass Packaging Institute v. Regan*, 737 F.2d 1083 (D.C. Cir.), *cert. denied*, 469 U.S. 1035 (1984) (*"Glass Packaging"*), *overruled in part on other grounds, Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 283 n.2 (D.C. Cir. 1988), the D.C. Circuit held that in proposing to allow the packaging of liquor in plastic bottles, the Bureau of Alcohol, Tobacco and Firearms was not required to address the environmental impacts of criminal tampering with the plastic bottles. *Id.* at 1091. The court found that "no cognizable environmental effect is implicated by the introduction of a new plastic container into the market place merely because it may be susceptible to tampering." *Id.*

Like *Metropolitan Edison, Glass Packaging* involved circumstances in which the alleged impact (the possibility that drinkers might be poisoned) was not causally related to any physical effect on the environment. In the case of *Metropolitan Edison,* the risk of a nuclear accident had no physical manifestation in the environment, and thus the Court decided the resulting impacts of psychological illness were too "attenuated" to warrant NEPA review. Similarly, in *Glass Packaging,* the introduction of a new type of plastic bottle to the marketplace, by itself, had no physical impacts to the environment, and thus the Court declined to extend NEPA's scope to the impacts that would result from tampering with the otherwise-benign bottles. Here, in contrast, SLOMFP is concerned about the potentially grave physical environmental impacts that would flow directly from the operation of the Diablo Canyon spent fuel storage facility if the spent fuel storage containers were breached in a terrorist attack. Pet. App. 21a. Thus *Mothers for Peace* constitutes an "entirely different case" from the circumstances of *Glass Packaging* or *Metropolitan Edison. Id.* at 20a (quoting *Metropolitan Edison,* 460 U.S. at 775 n.9).

Moreover, in *Glass Packaging* the responsible agency, the Food and Drug Administration, had evaluated the risk of tampering by injection through plastic-walled drug containers and found it to be insignificant, thus demonstrating that risks of tampering with similar beverage containers would not necessarily require an EIS. 737 F.2d at 1092. Here, in contrast, the NRC has acknowledged the risks of terrorist attacks on licensed nuclear facilities, "insist[ing] on its preparedness and the seriousness with which it is responding to the post-September 11th terrorist threat." Pet. App. 23a.

Similarly, the Second Circuit's decision in *City of New York v. U.S. Department of Transportation,* 715 F.2d 732 (2d Cir. 1983) ("*City of New York*"), raises no conflict with *Mothers for Peace.* In *City of New York,* the Second Circuit reversed a district court decision requiring the U.S. Depart-

ment of Transportation ("DOT") to prepare an EIS in support of regulations that would govern the safety of radioactive waste shipments through New York City and its environs. The Court affirmed DOT's conclusion that "the risks of sabotage were too far afield for consideration." 715 F.2d at 750.

Contrary to PG&E's argument (Pet. 17), the Second Circuit's use of the phrase "too far afield" does not imply that the court held as a matter of law that the causal connection between an agency's action and the environmental impacts of sabotage or terrorism would always be too weak to support application of NEPA. No such analysis can be found in the decision, and, indeed, the causal connection was not questioned in the decision. Instead, the phrase "too far afield" refers to the DOT's factual conclusion (reached in reliance on the NRC) that, at that time, the environmental consequences of terrorist attacks on plutonium shipments through New York City were only "remote possibilities" posing an "unascertainable risk." 715 F.2d at 750. Under NEPA, such a fact-based conclusion may not be relied on as an unimpeachable precedent for all time, but must be reconsidered in new circumstances and in light of new and significant information. *Marsh v. Oregon Natural Resources Council,* 490 U.S. 360, 374 (1989).[4] As the Ninth Circuit observed in *Mothers for Peace,* recent NRC pronouncements demonstrate that as a factual matter, the NRC no longer considers inten-

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[4] *See also Limerick Ecology Action, Inc. v. NRC,* 869 F.2d 719 (3d Cir. 1989), as discussed at page 15 below. Notably, in the context of reviewing a post-9/11 enforcement case brought under the Atomic Energy Act, the Second Circuit recently stated in dicta that because of changed circumstances it would no longer be "compelled" to follow a past decision approving the NRC's refusal to require "a showing of effective protection against . . . the possibilities of attack or sabotage by foreign enemies." *Riverkeeper, Inc, v. Collins,* 359 F.3d 156, 168 n.14 (2d Cir. 2004)(citing *Siegel v. Atomic Energy Commission,* 400 F.2d 778, 779 (D.C. Cir. 1968)).

tional attacks to be "remote possibilities," but now anticipates and carefully plans for them. Pet. App. 22a-24a.

Finally, there is no conflict between *Mothers for Peace* and *Mid States Coalition for Progress v. Surface Transportation Board,* 345 F.3d 520 (8th Cir. 2003) ("*Mid States Coalition*"). In Mid States Coalition, the Eighth Circuit upheld the Surface Transportation Board's ("STB's") refusal to grant a motion to re-open a railroad construction permit proceeding in order to evaluate the implications of a Maryland derailment of a train carrying toxic materials and the September 11 attacks with respect to the difficulty of immediately evacuating the Mayo Clinic. No question was raised regarding the causal connection between the railroad construction project and terrorist attacks. Instead, the court upheld the STB's factual conclusions that shipment of hazardous materials on the proposed line was "unlikely" and that the Maryland derailment and the September 11 attacks did not pose "a threat specific to Mayo." 345 F.3d at 543-44.

PG&E argues that if the Ninth Circuit had applied *Mid States Coalition* to the instant case, "it would have been forced to concede as a matter of law that the 'increased threat' of terrorism was a 'general' threat that 'does not bear specifically on the [PG&E] project,'" and therefore would have concluded that "NEPA's requirements were *not* triggered." Pet. 18 (emphasis in original). But the question whether a terrorist threat is general or site-specific is a factual one that must take into consideration the specific circumstances of each case. In *Mothers for Peace,* the court found that the NRC had ignored SLOMFP's "factual contentions that licensing the Storage installation would lead to or increase the risk of a terrorist attack." Pet. App. 21a. Thus *Mid*

States Coalition presents a different set of facts rather than a conflict.[5]

2. Decisions on quantification and burden of proof do not conflict.

Rather than conflicting with *Mothers for Peace, Limerick Ecology Action, Inc. v. NRC,* 869 F.2d 719 (3d Cir. 1989) ("*Limerick*") supports *Mothers for Peace*'s holding that "[n]o provision of NEPA, or any other authority cited by the Commission, allows the NRC to eliminate a possible environmental consequence from analysis by labeling the risk as 'unquantifiable.'" Pet. App. 25a. The Ninth and Third Circuits agree that the "mere assertion of unquantifiability" does not immunize the NRC from consideration of environmental impacts under NEPA. 869 F.2d at 744 n.31.[6] Indeed, both decisions are compelled by the NRC's own regulations, which provide that:

> The analysis for all draft environmental impact statements will, to the *fullest extent practicable*, quantify the various factors considered. *To the extent that there are important qualitative considerations or factors that cannot be quantified, these considerations or factors will be discussed in qualitative terms.*

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[5] Nor does *City of Shoreacres v. Waterworth,* 520 F.3d 440, 451-53 (5th Cir. 2005), cited in PG&E's Pet. 18 n.5, contradict *Mothers for Peace.* In that case, the Fifth Circuit cited *Public Citizen* for the proposition that one government agency may not be held responsible for environmental impacts that are controlled by another. That proposition is not at issue in *Mothers for Peace.*

[6] The dissenting opinion of Judge Scirica, quoted in *Mothers for Peace,* also agreed with the majority on this point, 869 F.2d at 754-55, so PG&E's criticism of the Ninth Circuit for quoting the dissent rather than the majority opinion is particularly unwarranted.

10 C.F.R. § 51.71 (emphasis added).[7]

Nor does the Ninth Circuit's placement of the burden of proof on the NRC rather than SLOMFP conflict with *Limerick*. PG&E confuses the burden of proof with the burden of going forward. Pet. 22. As a general rule, in NRC licensing cases, the applicant bears the burden of proof. 10 C.F.R. § 2.325; *Louisiana Energy Services* (Claiborne Enrichment Center), LBP-96-25, 44 NRC 331, 338 (1996), reversed on other grounds, CLI-98-3, 47 NRC 77 (1998). In NEPA cases, the burden of proof shifts to the NRC. *Id.* (citing *Duke Power Company* (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041, 1049 (1983)).

NRC regulations also place a burden of going forward on parties who seek to challenge license applications or NRC

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[7] PG&E errs in asserting that *Limerick* and *Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87 (1983) ("*Baltimore Gas & Electric*") required the Ninth Circuit to give a high level of deference to the NRC's determination that the potential for terrorist attacks is not capable of meaningful assessment. Pet. 21-22. In *Limerick*, the Third Circuit deferred to the NRC's "scientific determination" that the risks of a sabotage event could not be assessed, where the petitioner had failed to rebut it by proposing a "meaningful method by which the NRC could either assess or predict sabotage risks." 869 F.2d at 743-44, citing *Baltimore Gas & Electric*, 462 U.S. at 104. Here, in contrast, the NRC simply declared that "the possibility of a terrorist attack . . . is speculative and simply too far removed from the natural or expected consequences of agency action to require a study under NEPA" as a "matter of law," and without factual support. Pet App. 21a (quoting *Private Fuel Storage*, Pet. App. 54a). Moreover, the NRC failed to respond to SLOMFP's factual contentions challenging its determination. *Id.* The Ninth Circuit correctly held that a "reasonableness" test is appropriate, rather than "the strong level of deference we accord an agency in deciding factual or technical matters." Pet App. 17a-18a (citing *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 727 (9th Cir. 1995), *Makani'o Kohala Ohana, Inc. v. Water Supply*, 295 F.3d 955, 959 n.3 (9th Cir. 2002)).

determinations in a hearing. 10 C.F.R. § 2.309(f).[8] In *Limerick,* the Third Circuit found the petitioner had not met its burden of going forward with evidence to rebut the NRC's determination that the risks of sabotage could not be assessed, and therefore the petitioner could not obtain a hearing on whether the NRC should revisit its conclusion. 869 F.2d at 743-44. The Third Circuit did not shift the ultimate burden of proof from the NRC to the petitioners, and it acknowledged that the NRC's determination that the threat could not be assessed must be supported by the record. *Id.* at 743.

In fact, in another part of its decision, the Third Circuit found that the NRC had not met its burden of justifying its assertion that severe nuclear power plant accidents are remote and speculative in light of the results of "extensive research projects undertaken by the Commission concerning nuclear accidents." 869 F.2d at 738-40. Noting that "NRC defined serious accidents as remote and speculative before the partial core melt at Three Mile Island," *id.* at 739 n.24, the Third Circuit was "troubled" by the NRC's "seeming insistence on defining serious risks as remote and speculative, hence not considering their environmental impacts, until experience proves the Commission wrong." *Id.* at 740 n.6. Similarly, in this case the NRC's own regulatory actions and policies fatally undermine its position that terrorist attacks are remote and speculative.

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[8] The regulation was formerly codified at 10 C.F.R. 2.714(b). *See also Louisiana Power* and *Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-732, 17 NRC 1076, 1093 (1983).

II. PG&E'S POLICY OBJECTIONS TO THE NINTH CIRCUIT'S RULING ARE UNWARRANTED SPECULATIONS, RAISING NO IMPORTANT QUESTIONS OF LAW.

PG&E's non-legal objections to the Ninth Circuit's decision, which it frames as policy concerns regarding national security consequences and practical concerns over expeditious processing of nuclear facility licenses, do not raise an "important question of federal law" warranting review by this Court. Sup. Ct. R. 10(c). Further, PG&E's parade-of-horribles speculations are unsupported by the administrative record, particularly as to national security concerns.[9]

The Ninth Circuit's remand gave the NRC substantial discretion as to how best to perform NEPA review of intentional attacks on nuclear facilities. The court noted the NRC's considerable expertise in establishing procedures for the handling of sensitive information, observing that the agency "has dealt with our nation's most sensitive nuclear secrets for many decades." Pet. App. 31a. The court also expressly authorized the NRC to modify NEPA procedures as necessary in view of any security risks. *Id.* If consequences for national security generally and nuclear licensing specifically were remotely as grave as PG&E suggests, it is surprising that the agency directly affected – the Nuclear Regulatory Commission – has not filed a petition for certiorari in this Court.

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[9] PG&E itself publicly stated in the wake of the Ninth Circuit's opinion that the ruling would not delay construction of the storage facility. *See* David Sneed, "Court Orders Diablo Terror Analysis," San Luis Obispo Tribune (June 2, 2006) ("Diablo Canyon officials said the ruling does not affect the operation of the plant and will not delay construction of the dry cask storage facility.") A copy of the article is available at http://www.topix.net/content/kri/322606995901267280724123737322625634132.

CONCLUSION

For the foregoing reasons, PG&E's petition for a writ of certiorari should be denied.

Respectfully submitted,

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